SINGAPORE FLOUR MILLS PTE LTD *a*

v.

THONG YIK ANIMAL FEED SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR *b*
FAIZA TAMBY CHIK J
[ORIGINATING SUMMONS NO: R2-24-14-2000]
27 NOVEMBER 2000

CIVIL PROCEDURE: *Judgment - Reciprocal enforcement of judgments - Application to set aside registration order beyond time limit of 14 days - Whether excusable delay - Whether financial position of plaintiff relevant* *c*

The plaintiff (respondent) had duly applied for and obtained a registration order to register the judgment of the High Court of the Republic of Singapore as a judgment of the High Court of Malaya pursuant to the Reciprocal Enforcement of Judgments Act 1958. The order was served on the defendants (appellants) and the appellants filed this application to set aside the said order more than 14 days after the date of service. *d*

Held: *e*

[1] The appellants had two courses of action open to them, namely, either to apply to set aside the registration or apply to extend time. Either one of these applications should have been made within the fourteen-day period stated in the said registration order. If there were voluminous documents that needed to be collected, the appellants had to merely make an application to extend time within the time period allowed, giving acceptable reasons. *f*

[2] The power to extend time should be exercised judicially, not arbitrarily or capriciously, and it ought not to be exercised unless the requirement of justice is satisfied. The appellants must put forward good and cogent reasons before this court. *g*

[3] In the instant case the reasons put forward by the appellants can be easily dismissed. Delay in instructing counsel and solicitor can hardly be a reason or ground for an application for an extension of time. *h*

[4] The appellants argued that their application to enlarge time should be allowed on the basis of the respondent's financial status. However, this cannot be permitted because in an application for extension/enlargement of time, the onus is upon the appellants to show "excusable delay", *i*

which had nothing to do with the respondent's financial position. Furthermore, since the evidence of the respondent's financial position was not before the learned deputy registrar and contrary to the provisions of O. 56 r. 1(3A) of the Rules of the High Court 1980, the appellants have sought to introduce new evidence before this court.

[Application dismissed with costs.]

Case(s) referred to:

International Factors Leasing Pte Ltd v. Winds Cruises Pte Ltd & Ors [1999] 4 MLJ 165 ***(foll)***

Majlis Peguam v. Tan Sri Dato' Mohamed Yusoff Mohamed [1997] 3 CLJ 332 ***(refd)***

Raja Guppal Ramasamy v. Sagaran Pakiam [1999] 2 MLJ 677 ***(refd)***

RHB Cathay Securities Pte Ltd v. Lim Bee Keong [1999] 5 MLJ 641 ***(refd)***

Shell Malaysia Trading Sdn Bhd v. Pemungut Duti Stem, Pulau Pinang [1998] 1 CLJ Supp 126 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2)

Interpretation Acts 1948 & 1967, ss. 2(3), 45

Rules of the High Court 1980, O. 56 r. 1(3A), O. 67 r. 5(1), (2), (3)

Other source(s) referred to:

Atkin's Court Forms, 2nd edn, 1991 issue, para 94, vol 19(1)

For the plaintiff - Michael Chow (Tharminder Singh); M/s Logan Sabapathy & Co

For the 2nd & 4th defendant - Tommy Thomas; M/s Tommy Thomas

Reported by Yow Ting Fong

JUDGMENT

Faiza Tamby Chik J:

Plaintiff (respondent) has duly applied for and obtained from this court an order dated 3 April 2000 ("the said Registration Order") to register the judgment of the High Court of the Republic of Singapore given in suit No. 201 on 31 March 1998 ("the said judgment") as a judgment of the High Court of Malaya pursuant to the provisions of the Reciprocal Enforcement of Judgments Act 1958 ("the Act"). It was *inter alia,* a term of the said Registration Order that "the defendants were at liberty to apply to set aside the said registration within fourteen (14) days after being served upon the Notice of Registration". The said Registration Order together with the relevant Notice to Judgment Debtor In Respect of the Registration of Foreign Judgment in court dated 10 May 2000 ("Notice") were duly served

on the 4th and 2nd defendants (appellants), namely Bidara Holdings Sdn. Bhd. ("Bidara") and Mazlan bin Harun ("Mazlan") on 11 May 2000 and 30 May 2000 respectively. The said appellants together with the 3rd defendants then filed an application *vide* summons in chambers dated 23 June 2000 (encl. 7) seeking *inter alia*, to set aside the said Registration Order together with a prayer for extension of time of the appellants.

The following affidavits were filed in respect of encl. 7:

(a) the affidavit of Lee Kok Pheng affirmed on 21 June 2000 ("Lee's 1st affidavit" (encl. 8));

(b) the affidavit of Ng Gim Bee affirmed on 7 July 2000 ("plaintiffs 1st affidavit" (encl. 9));

(c) the affidavit of Lee Kok Pheng affirmed on 12 July 2000 ("Lee's 2nd affidavit" (encl. 10))'

(d) the affidavit of Ng Gim Bee affirmed on 27 July 2000 ("plaintiff's 2nd affidavit") (encl. 11); and

(e) the affidavit of Lee Kok Pheng affirmed on 11 August 2000 ("Lee's 3rd affidavit") (encl. 12).

However for the purposes of this appeal, only Lee's 1st affidavit will be relevant, since the grounds relied on by the appellants are set out in para. 3 of the same, and briefly are that:

(a) the appellants were served on diverse dates;

(b) delay in instructing counsel and solicitors of the appellants' choice;

(c) delay in collecting the relevant documents and cause papers from the appellant's solicitors both in Singapore and Seremban; and

(d) the 3rd defendant was only served on 14 June 2000.

Order 67 r. 5 of the Rules of the High Court 1980 ("the Rules") expressly provides as follows:

Rule 5(1)

> An order in Form 145 giving leave to register a judgment must be drawn up by, or on behalf of, the judgment creditor and served on the judgment debtor.

Rule 5(2)

> Every such order **shall state the period within which an application may be made to set aside the registration** and shall contain a notification that execution on the judgment will not issue until after expiration of that period: (emphasis added).

Rule 5(3)

> The Court may, on an application made at any time while it remains competent for any party to apply to have the registration set aside, extend the period (either as originally fixed or as subsequently extended) within which an application to have the registration set aside may be made.

It is clear from the provisions of O. 67 r. 5(3) that a judgment debtor is entitled as of right to apply to court to set aside an order giving leave to register a foreign judgment within the time limit stipulated in such an order. Further, it is also clear that a judgment debtor is entitled to make an application to extend the time limit within which he may make such an application to set aside provided that the application for extension of time is made while he is competent to make the application to set aside. Obviously therefore, the application *vide* encl. 7 made jointly by the appellants together with the 3rd defendant was out of time so far as the appellants were concerned. And bearing this in mind the appellants had included a prayer in the said encl. 7 for an extension of time. The appellants now contend that notwithstanding the express provisions of O. 67 r. 5(3) of the Rules, this court has a power to extend time even if the application is made outside time for the following reasons:

(a) the general power given in s. 25(2) of the Courts of Judicature Act, 1964 (CJA) read together with para. 8 of sch. 2; or

(b) the construction of a power to extend time as set out in s. 45 of the Interpretation Acts, 1948 and 1967 (IA).

However, I am of the view that both of the above provisions are of no assistance to the appellants for the reasons given hereinafter.

The proviso of s. 25(2) of the CJA 1964 clearly precludes the interpretation sought to be given by the appellants to the power contained in para. 8. Section 25(2) of the CJA 1964 and its proviso reads:

> Without prejudice of the generality of subsection (1) the High Court shall have the additional power set out in the Schedule: Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

The extent of the power contained in s. 25(2) CJA 1964 read together with the 2nd schedule has been the subject to judicial pronouncements, and consistently, the highest courts of this country have held that the power in s. 25(2) is subject to express and/of implied prohibition, which is present in O. 67 r. 5(3) of the rules.

In *Majlis Peguam v. Tan Sri Dato' Mohamed Yusoff bin Mohamed* [1997] 3 CLJ 332 Mohd. Azmi FCJ at p. 355 said:

> The rule is that a prescribed time in any written law is always presumed and construed as mandatory unless there is express power in that particular law to abridge or extend. The general provision in para. 8 of the Schedule is power-conferring provision which has no precondition **except that it must be exercised in accordance with any existing written law or rules of court relating thereto.** (emphasis added).

Hence that the provisions of O. 67 r. 5(3) of the Rules expressly give jurisdiction to the court to extend time provided an application is made within the time limited to apply to set aside the registration. Conversely, O. 67 r. 5(3) of the Rules expressly or at least by necessary implication prohibits an application for an extension of time made outside the time limited to apply to set aside the registration. In this regard, para. 94 of vol. 19(1) *Atkin's Court Forms*, 2nd edn, (1991 issue) reads:

> ... the Order must state the period within which an application may be made to set aside the registration and must contain a notice that execution on the judgement will not issue until after that period has expired; **before that period has expired, any party may apply by summons for the period, or an extended period, to be extended.** (emphasis added)

In the instant case I think any reference to s. 45 IA 1948 & 1967 simpliciter is misconceived without reference to s. 2(3) of IA 1948 & 1967. Section 2(3) of IA 1948 & 1967 reads:

> PART I shall not apply where there is:
>
> (a) express provision to the contrary; or
>
> (b) something in the subject or context inconsistent with or repugnant to its application.

Having regard to paras. (a) or (b) of s. 2(3) of IA 1948 & 1967, s. 45 IA 1948 & 1967 clearly cannot be used as an aid for the construction of O. 67 r. 5(3) of the Rules in the fashion as suggested by the appellants. All in all, tested against the above position, my decision in the case of *International Factors Leasing Pte. Ltd. v. Winds Cruises Pte. Ltd. & Ors.* [1999] 4 MLJ 165 would not be affected and further that the court

would not have come to a different conclusion. It is noted here that the appellants had two courses of action open to them, namely, either to apply to set aside the registration or apply to extend time. Either of this application should have been made within the fourteen-day period stated in the said Registration Order. If indeed, there were voluminous documents that needed to be collected, the appellants had to merely make an application to extend time within the time period allowed, giving acceptable reasons.

It must be observed that the power to extend time should be exercised judicially, not arbitrarily or capriciously, and it ought not to be exercised unless the requirement of justice is satisfied (per Mohd. Azmi HMP at p. 292B in the case of *Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff bin Mohamed* [1997] 3 CLJ 332). A similar sentiment was echoed by Vincent Ng J in the case of *Shell Malaysia Trading Sdn. Bhd. v. Pemungut Duti Stem, Pulau Pinang* [1998] 1 CLJ Supp 126 where at p. 140, he said:

> ... the Court must nevertheless exercise its discretion judicially, in accordance with correct principles and not arbitrarily or capriciously or contrary to existing written laws or rules or court, and this must be reflected in its ground favouring the exercise of such discretion.

The exercise of a power to extend time, therefore, would require the appellants to put forward good and cogent reasons before this court. In the instant case my view is that the reasons put forward by the appellants, can if tested against the background of objective reality, be easily dismissed.

The appellants contended that the delay was due to them having to procure documents from their previous solicitors both in Singapore and Seremban. Against the background of the number of pages forming the exhibits to Lee's 1st affidavit purely, fourteen days from service on Bidara would have been more than ample time to collect the same. Bearing in mind the advancement in the field of communications, documents can be sent and received within a matter of minutes by e-mail or facsimile or within 48 hours by courier. In the extreme situation, Seremban is a mere one hour drive from Kuala Lumpur and Singapore is at best four hours away.

As for the KLHC D2-22-712-11992 suit, the documents could have easily be obtained by conducting a search at the Kuala Lumpur High Court Registry. In fact, it was admitted in exh. "LKP1" to Lee's 3rd affidavit, particularly at para. 5 at p. 8, that the appellants have obtained documents and information by conducting such a search.

Delay in instructing counsel and solicitor can hardly be a reason to ground for application for extension of time. In any event, the appellant apart from the bare statement in Lee's 1st affidavit has not shown what attempts, if any were made to instruct solicitors and counsel. In any event, the delay in serving the 3rd defendant is irrelevant and has no connection whatsoever with the applications by the appellants to set aside the said Registration Order. In addition, the first service upon Bidara ought to and must have alerted Ramlan and Bidara in regard to the said Registration Order given their clear connection to each other. In the circumstances, it does not lie in the mouth of the appellants to now complain about the difference of service. In any event, Ramlan and Mazlan could have if they wanted to, contact the Respondent's solicitors to obtain copies of the said Registration Order and Notice. It is observed that from the date of the first service, namely on Bidara, it took the appellants together with Mazlan, a total of 43 days to file the application to set aside. The appellants have purported to be candid about this delay without any contemporaneous documents whatsoever to show the efforts taken to, *inter alia,* obtain documents.

The appellants have attempted to persuade this court that their application to enlarge time should be allowed on the basis of the respondent's financial status. However, this cannot be permitted for two reasons, namely:

(i) in application for extension/enlargement of time, the onus is upon the appellants to show "excusable delay", namely, they have to justify their delay, which delay had nothing whatsoever to do with the respondent's financial position. In short, this is irrelevant for the purposes of the present appeal; and

(ii) the evidence of the respondent's financial position was not before the learned deputy registrar as it contained Lee Kok Pheng's affidavit affirmed on 29 August 2000 and filed to support its application for a stay. The appellants have, contrary to the provisions of O. 56 r. 1(3A) of the Rules, sought to introduce new evidence before this court.

As can be seen here, having dismissed the appellants' application to extend time, the learned deputy registrar took the stand that consequently their application to set aside could no longer be heard. I think that this course of action taken by the learned deputy registrar was correct, for KC Vohrah J in the case of *RHB Cathay Securities Pte. Ltd. v. Lim Bee Keong* [1999] 5 MLJ 641 when dealing with a similar situation, at p. 645H held:

> The SAR having rejected the application for extension of time, he should not have gone on to consider the other application. The other application did not arise to be considered as the order rejecting the application for extension of time meant that the other application could not be made. And it is for this reason I did not consider the other application.

The inescapable conclusion therefore is that an application to set aside or to extend time to make such an application ought not be entertained unless made within the time period set out in the registration order. Moreover the appellants have not shown good reasons or any reasons at all to justify this court to exercise its discretion in their favour and in this regard reference is made to the time honoured words of Aboolcader J quoted by Haidar JCA in the case of *Raja Guppal a/l Ramasamy v. Sagaran a/l Pakiam* [1999] 2 MLJ 677 at p. 680 G:

> By way of postscript, we quote, 'it is time the litigants and their legal advisers realise and appreciate that rules are made to be observed and complied with and not flouted or wantonly ignored *ad libitum*', per Abdoolcader J, in dealing with the failure of the appellant to comply with the statutory provision requiring service of the copy of the record of appeal on the respondents or their solicitors in the Federal Court case of *Ng Yit Seng & Anor. v. Syarikat Jiwa Mentakap Sdn. Bhd. & Ors.* [1981] 2 MLJ 194 at page 195.

The application is dismissed with costs.